

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN SEATTLE

## TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE RICARDO S. MARTINEZ

June 7, 2010

## **APPEARANCES :**

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1 (sub-proceeding 91-1)

2 THE CLERK: We are back on the record in  
3 sub-proceeding 91-1. Will counsel please make their  
4 appearances for the record?

5 MS. RASMUSSEN: May it please the Court, my name  
6 is Lauren Rasmussen for the Jamestown Klallam Tribe.

7 THE COURT: Now you are all by yourself over  
8 there.

9 MS. RASMUSSEN: There isn't co-counsel here.

10 MR. BERLEY: Your Honor, Richard Berley for the  
11 Makah Tribe. With me is Brian Gruber.

12 MR. RAAS: Good afternoon to the Court. Dan Raas  
13 from the Lummi Nation. With me is Ms. Mary Neil.

14 MR. MORISSET: May it please the Court, Mason  
15 Morisset for the Tulalip Tribes.

16 MR. LYON: Good afternoon, your Honor. Kevin  
17 Lyon with the Squaxin Island Tribe.

18 MR. STILTNER: Sam Stiltner with the Puyallup  
19 Tribe.

20 MS. HANSEN: Good afternoon again, your Honor.  
21 Michelle Hansen for the Suquamish.

22 MR. LEWIS: Good afternoon, your Honor. Yale  
23 Lewis, co-counsel for the Quileute.

24 MS. KRUEGER: Good afternoon, your Honor.  
25 Katherine Krueger, co-counsel for the Quileute Tribe.

1 MS. FOSTER: Good afternoon, your Honor. Alix  
2 Foster for the Swinomish Indian Tribal Community.

3 MR. STAY: Hello again, your Honor. Alan Stay  
4 for the Muckleshoot Tribe. We are just here observing  
5 today.

6 MR. REICH: Richard Reich with the Muckleshoot  
7 Tribe. As Mr. Stay said, we are just observing.

8 MR. DORSAY: Craig Dorsay for the Hoh Tribe, your  
9 Honor.

10 THE COURT: Anyone else? Ms. Rasmussen, it is  
11 your motion.

12 MS. RASMUSSEN: We are here today to ask this  
13 Court to hold the Makah in contempt for its violation of  
14 the 2010 halibut management plan. As the Court well  
15 knows, this is the third round of motions before the Court  
16 this year, starting off with the Makah's motion to clarify  
17 which plan was the status quo, which resulted in your  
18 Honor's order clarifying that the 2000 plan was to be the  
19 status quo for the fishery, a motion by myself two days  
20 before the fishery starts, trying to clarify what indeed  
21 it meant to update the plan to current conditions. And I  
22 filed this motion because this year the plan, for the  
23 first time ever, yielded a 14 or 15-day fishery, when the  
24 objective of the plan is a 30-day fishery. And that has  
25 never happened before. And this is the first time we have

1 had a plan in recent years that we knew we could have your  
2 Honor's help in enforcing.

3 THE COURT: Ms. Rasmussen, I have a question.  
4 You said "the objective." Isn't it just one of the  
5 objectives?

6 MS. RASMUSSEN: Yes, your Honor. I will turn  
7 your attention to the 2010 management plan. The plan  
8 starts with listing the parties, and then it has the  
9 statement objective, singular, to fully harvest the 2010  
10 tribal commercial TAC, which is the total allowable catch  
11 allotted to the tribes, while providing a 30-day fishery  
12 beginning March 6th.

13 The structure of the plan has but one sole  
14 objective. In order to demand -- request contempt, we  
15 must show that both the Makah violated a clear order of  
16 the Court and that they failed to take all reasonable  
17 steps to comply with the order.

18 As I said before, the fishery resulted in a 14 or  
19 15-day fishery for the first time ever. And the reason  
20 for this is the Makah opened a second unrestricted fishery  
21 on March 20th, 15 days in advance.

22 Under the provisions for the restricted fishery,  
23 which are in front of your Honor, a party can only open a  
24 second unrestricted fishery if the catch is radically  
25 less. And it says 75,000 pounds. Then the unrestricted

1                   fishery may be open for a modest additional period of  
2                   time.

3                   This year the first 48-hour period of the  
4                   unrestricted fishery caught 119,000 pounds. It was not  
5                   radically less than 100,000 -- than 75,000 pounds, and,  
6                   therefore, the second unrestricted fishery was a violation  
7                   of the plan.

8                   Now, the Makah, in attempting to avoid this  
9                   particular provision, tries to characterize the second  
10                   unrestricted opening as a mop up. They argue that the mop  
11                   up is a third required sub-fishery of this plan.

12                   But, again, if we go to the plan's provisions, we  
13                   have a structure. I think of the structure of the plan as  
14                   -- the objective is the table top and the legs are how the  
15                   table is going to stay standing. And here we have the mop  
16                   up fishery, which is allotted essentially whatever is  
17                   remaining after the unrestricted fishery. The amount  
18                   allotted to the mop up fishery is 84,000 pounds. It is a  
19                   management buffer. It is what they use repeatedly in  
20                   management plans to protect the fishery structure from  
21                   going over the total allowable catch. They did not  
22                   allocate all the fish. The unrestricted fishery and the  
23                   restricted fishery amounts add up to less than 250,000  
24                   pounds. There is 84,000 pounds of protective mechanism in  
25                   case either of the two fisheries go over.

1                   THE COURT: Counsel, let me ask you a much more  
2 basic question. I want to make sure I understand this.  
3 What is more important, to harvest the total allowable  
4 catch or to fish for 30 days?

5                   MS. RASMUSSEN: In some ways I don't understand  
6 your question, because the point of the plan was to fish  
7 for 30 days and make the TAC last that long. It is both.  
8 If we go back to the reason the S'Klallam brought the  
9 sub-proceeding, it is providing a minimum amount of time  
10 which would allow parties to get out, gear up for the  
11 fishery, find the fish and bring them home. And that's  
12 why we negotiated to have this provision be the objective  
13 of the plan, which is to provide that minimum opportunity  
14 for the small fleets of the S'Klallams to get out there,  
15 not be barred by two days of bad weather, actually get out  
16 there and get a chance to go fishing.

17                  The reason it is spoken of in terms of  
18 opportunity is because my clients firmly believe you have  
19 the right to go out and try, but if you don't catch --  
20 You are not guaranteed -- There is no entitlement.

21                  One of the differences of opinion we often have  
22 with the Makah is because they have been fishing this  
23 fishery for a really long time. It has been going well  
24 for them for a really long time. It has been hard for  
25 them to make room for other folks. We don't want to take

1       their share, we just want a chance to fish alongside them.  
2       And so we negotiated this plan with this sole objective.

3               One of the things that gets lost in this  
4       interpretation that you see in front of the Court,  
5       starting in 2000, what is the status quo, what does  
6       status quo mean, so on and so forth, I think its loss is  
7       the good faith requirement in the Court's order, the  
8       faithfulness to the agreed-upon common purpose and the  
9       consistency with the justified expectations of the party.

10              So when you see the provisions of the plan, and  
11       you see that there is one objective, and it is the 30-day  
12       fishery, and you see that, okay, you could probably if you  
13       had a good lawyer find a way to wiggle out from under this  
14       or excuse what you did and open the fishery early. You  
15       are not allowed to do that under the restatement second  
16       comment A, "Faithfulness to the agreed-upon purpose and  
17       consistency with the justified expectations of the  
18       parties."

19              I ask you -- When I look at the plan, and I ask  
20       myself the question, what is the common purpose of the  
21       2010 halibut plan, I see one objective. Paragraph 2 of  
22       the agreement says, "To fully harvest the TAC while  
23       providing the 30-day fishery." And the rest of it is the  
24       structure for how we are going to protect the restricted  
25       fishery from getting eaten up by the unrestricted fishery,

1 because the unrestricted fishery is fast, hard to control,  
2 everybody goes out and harvests as much as they can in a  
3 short period of time. And so all these management limits  
4 are intended to protect the restricted fishery from  
5 getting eaten up from the competing demands of the  
6 unrestricted fishery and provide this important  
7 opportunity for the smaller fleet.

8 This case was not brought by Makah to protect  
9 their unrestricted fishery. This case was brought by the  
10 S'Klallam to protect their opportunity to get out there  
11 and not be cut off, or preempted, or have the fishery  
12 closed before their single boat gets out on the water.

13 I come back to that because, in the discussions  
14 that occurred this year, there was this movement to try to  
15 manipulate the plan, but there was nobody who said, you  
16 know what -- Actually there was one person. There was  
17 one person that said -- when there was an argument about  
18 the plan and how it should be interpreted, somebody said,  
19 you know, I shouldn't have to look to a declaration to  
20 know what the plan means. I should be able to look at the  
21 plan and know what I'm supposed to do and what I am not  
22 supposed to do. And when I look at the plan, it is very  
23 clear to me that you cannot -- that April 5th is not  
24 March 20th.

25 And when you were faced with that problem, that

1 you reached the range of the restricted fishing early --  
2 In fact, the evidence before you is that all the parties  
3 went over the range of the restricted fishery by  
4 16,000 pounds before anybody closed. You couldn't just do  
5 your own thing. You couldn't just go out there and open  
6 the second unrestricted early without the consensus of  
7 everybody else.

8 And this is the same problem that has happened  
9 for years in this fishery. I think it comes from a  
10 feeling of entitlement. I am not here to psychoanalyze  
11 everybody, but when you come into the fishery and you  
12 think you can manage it without everybody's consensus --  
13 You see the 2009 objection that the S'Klallam made to the  
14 Makah. We said, hey, you can't do that. The 2000 plan  
15 was really the last one that was adopted by consensus.  
16 You see the letter back from Brian Gruber, no, we have  
17 seven of the 13 participating tribes; we can go forward  
18 without you; you are de minimus. That is the attitude  
19 that permeated last year. It is permeating the  
20 interpretations this year, which is, if we can get a few  
21 people to go along with us, people that find this fishery  
22 beneficial to them, or for whatever reason adhere to this  
23 particular interpretation of the plan, then that's okay.  
24 And it is not okay.

25 When I come back to the plan itself, even under

1 the Makah's interpretation, where it tries to characterize  
2 this opening as a mop up, you will see the provision I  
3 underlined. It says the mop up cannot even be discussed  
4 until April 5th, which is the end of the 30-day  
5 restricted. At that point, you are supposed to discuss  
6 management options and agree to a management plan for the  
7 remaining portion of the tribal commercial TAC. So even  
8 when you open a mop up, you have to have agreement. You  
9 can't just go do your own thing.

10 This language also further counters Makah's  
11 argument that the mop up is a required third sub-fishery  
12 that should be allowed to frustrate the objective of the  
13 plan, that protecting this 84,000 pounds should be equal  
14 to protecting the 30 days.

15 If you read the plan consistent with the common  
16 purpose, you really have to let -- you would be letting  
17 the whole plan be frustrated by your interpretation. And  
18 I believe under the law you are not allowed to do that.  
19 You are not allowed to do that. And when they opened the  
20 fishery on March 20th, it was a violation of the plan.

21 Now, there is a couple of reasons they have  
22 given for why they had to open the unrestricted fishery.  
23 They don't deny they opened the unrestricted fishery on  
24 March 20th. They don't deny at that point we had been way  
25 into the restricted catch. They say the reason they had

1 to open this fishery early -- These are their reasonable  
2 steps they took to comply. One was the issue that we have  
3 addressed already, that the mop up is a required third  
4 sub-fishery. You see they tried to get away from the  
5 terminology mop up and called it a sub-fishery, because  
6 mop up is the management buffer. It is harvesting  
7 whatever remains.

8 They say that we elevated the restricted fishery  
9 to the objective. We didn't elevate it, the plan elevates  
10 it. It is the 30 days. Everything turns around that 30  
11 days in trying to hold it up.

12 They say they had to open the unrestricted  
13 fishery because we continued on March 17th to fish on  
14 March 18th and March 19th, and then they all reopened  
15 again an unrestricted fishery on March 20th.

16 So, again, we were fishing with management  
17 limits.

18 This is the do-as-I-say-not-as-I-do defense.  
19 They harvested themselves way into that expected range.  
20 We were 16,000 pounds over when they said, well, now we  
21 don't want to do that anymore; we want to do the  
22 unrestricted fishery, and we want to take whatever is left  
23 and just go fishing. That is not proper. That is not a  
24 correct interpretation of the plan. Again, consistent  
25 with the agreed-upon common purpose and the justified

1 expectations of the party.

2 The S'Klallam and the S'Klallam fishermen, whose  
3 declarations I put before you, had justified expectations  
4 that 30 days meant 30 days. If there is some way this  
5 plan can be interpreted so 30 days doesn't mean 30 days,  
6 then we have a problem. To me and to the fishermen, that  
7 doesn't seem right.

8 Now, the last thing that they come forward with,  
9 and they may have something else to say after I sit down,  
10 is, look, your Honor, we made this proposal, we made this  
11 250-pound per fisher with two landings per week proposal.  
12 The S'Klallam, they ignored us. They weren't really  
13 willing to manage this restricted fishery.

14 I want it to be crystal clear, that a 250-pound  
15 limit with two landings per week is a two-weekday per week  
16 fishery. A landing is when the boat comes into the dock.  
17 And the small boats come into the dock every day.

18 It is like giving somebody a job for a month and  
19 having them come in for two days. And you say, well, I am  
20 not in breach of your contract because I gave you work on  
21 the first day of the month and I gave you work on the last  
22 day of the month, and, therefore, I employed you for a  
23 month. Well, that is not -- that wouldn't be 30 days of  
24 employment, and this is not 30 days of fishing that their  
25 proposal was meant to achieve. Their proposal was meant

1 to reduce the fishery to essentially two days. And it  
2 wasn't a reasonable proposal and attempt to achieve the  
3 common purpose.

4 I respectfully request that, although it is an  
5 extraordinary measure, this Court hold the Makah  
6 accountable. Any other lack of clear response to a  
7 violation of an order, even if it is just for one more  
8 year, is a win. If anything less than saying, you know,  
9 it is not okay to do this, this is a wrong on the  
10 S'Klallam, and the S'Klallam came before this Court and we  
11 asked, please don't let this plan be breached, please  
12 protect us. Perhaps it wasn't right, perhaps it hadn't  
13 happened yet, perhaps it was convincing that our claims  
14 were hypothetical and there was a lack of support. But we  
15 tried. We tried to stop it. And nobody wanted to do  
16 anything.

17 We ask this Court to take clear guidance, to  
18 enforce the plan, and really get back to what the  
19 court said in sub-proceeding 80-1, which is, between  
20 sovereigns it is especially important to enforce their  
21 obligations.

22 As the Suquamish just filed in their joint status  
23 report, there is 360-day, by their count, and I haven't  
24 counted myself, types of agreements filed with the Court.  
25 And if you don't require parties to adhere to the plans

1 and fulfill the justified expectations of the parties,  
2 then a wrong is committed. Thank you.

3 THE COURT: Counsel, before you step down, let me  
4 ask you a couple of questions. I am having a little bit  
5 of a problem understanding this. You have X amount of  
6 fish, you have Y amount of fishermen, in terms of your  
7 plan and your proposal. And I understand fully well from  
8 reading your materials how important it is to your clients  
9 to have that 30-day period of time to go out there and  
10 fish. Is there no room for adjustment if the amount  
11 allocated to the fishery is reached sooner than the 30  
12 days? What if there is one halibut out there?

13 MS. RASMUSSEN: If there is one halibut out  
14 there, then obviously we can't fish for 30 days. We don't  
15 have one halibut, we have 251,000 halibut. In 2000, when  
16 this plan was adopted, there was 300,000 halibut. And we  
17 got 60 days out of the fishery, from just the restricted  
18 fishery alone.

19 I don't know if we are at the point yet where we  
20 can surmise what we would do if the catch dwindled to a  
21 small fraction of what it is today. But right now, there  
22 is a way to get 30 days out of the 250,000 pounds. And we  
23 didn't get it because of the illegal, unrestricted,  
24 free-for-all fishery that was opened instead.

25 THE COURT: But if everybody has scaled down

1       their catch limit per day, wouldn't that give you your 30  
2       days?

3           MS. RASMUSSEN: I guess I am not understanding  
4       what you are proposing.

5           THE COURT: Again, we get back to this so many  
6       fish, so many fishermen, right?

7           MS. RASMUSSEN: Yes.

8           THE COURT: So once you determine how many fish  
9       there are, then you can figure out how many can be caught  
10      per day by fishermen.

11       MS. RASMUSSEN: Yes.

12       THE COURT: So if you scaled down the amount of  
13      fish you are allowed to catch per day in an agreement,  
14      that would give you your 30 days to fish, correct?

15       MS. RASMUSSEN: Yes. Where the difference of  
16      opinion lies is how many fish we have to work with. Under  
17      the Makah interpretation of the plan, the expected catch  
18      range is a hard cap at 48,000 pounds. Therefore, the  
19      management buffer, in their view, is only to be used to  
20      buffer the unrestricted fishery, it is not to be used to  
21      buffer the restricted fishery. That is where the rubber  
22      hits the pavement. That's where their interpretation of  
23      the plan is being used to destroy the common purpose.

24       THE COURT: All right. What about the Makah's  
25      assertion that the S'Klallam Tribes had their best catch

1 ever? Jamestown S'Klallam, best catch in 20 years for  
2 Port Gamble.

3 MS. RASMUSSEN: It is a nice fact, but it is not  
4 relevant to the question of whether the Makah violated the  
5 plan. They would have had an even better year if they had  
6 gotten their 30 days that was promised to them. When you  
7 and I have a contract, just because I happen to make a lot  
8 of money somewhere else or do well, that is not the  
9 relevant point. The point is the promise. The promise  
10 would have gotten my clients a whole lot more than they  
11 did get.

12 And the 30-day opportunity is interesting to  
13 folks in the fishery -- I provided some declarations of  
14 fishermen that said -- The Port Gamble fishermen are  
15 actually going to get out there for the first time in a  
16 long time. The thing that has been holding them back is  
17 just knowing that they can get out there. And also, you  
18 know, being squeezed in other fisheries. Not to argue the  
19 culvert case while folks are gone, but being squeezed in  
20 the other fisheries puts more pressure between tribes.

21 A lot of folks don't like to have intertribal  
22 disputes. And I don't like them either. But when you are  
23 squeezed on all levels, and then you are sharing the  
24 250,000 pounds, there is going to be tensions. And we  
25 would love to be able to resolve these tensions, but the

culture of this fishery has been this era of entitlement and tyranny of the majority.

THE COURT: Thanks, Ms. Rasmussen.

MR. BERLEY: Good afternoon, your Honor. I am Richard Berley for the Makah. We do have the chairman of the tribe here, Michael Lawrence. We have several elected officials of the tribe here, councilmen. We have the fisheries director of the Makah Tribe here. There are a lot of people that are interested.

As you have heard, your Honor, we have a tremendous difference of opinion with the S'Klallams about the meaning of the 2000 plan. It is not just Makah. Most of the halibut tribes have a tremendous difference of opinion about the interpretation of the plan.

We have a court opinion in this case from 2001 which interprets this plan. And it is at odds with the S'Klallam's interpretation of the case. It is the law of the case, and the S'Klallam don't even mention it.

The 2000 plan itself calls for three sub-fisheries. It is very clear on this point. It doesn't emphasize one over the other. Each sub-fishery has an associated sub-quota. All three are important in different ways to different tribes. All three must be protected.

## The Court's 2001 order by Judge Rothstein

1 provides the clearest explanation of the purposes and  
2 administration of the plan. And it is inconsistent with  
3 the S'Klallam's position.

4 The S'Klallams look at one term of one  
5 sub-fishery and say it trumps everything else. They  
6 ignore the other two sub-fisheries. And even as to the  
7 restricted sub-fishery, the one they care about, they  
8 ignore all other terms, as you have heard just now, except  
9 for the 30-day time period within which the restricted  
10 fishery is supposed to be managed. But the restricted  
11 sub-fishery does have a sub-quota, and it has to be  
12 managed for it. The only way to manage for it is through  
13 cooperation among the tribes. And the plan explicitly  
14 calls for that.

15 The S'Klallams have tried to change the  
16 restricted fishery sub-quota in their last motion to  
17 clarify. They failed to do that. The restricted fishery  
18 sub-quota remains at 15 to 20 percent -- 15 to 19 percent,  
19 in that range. That sub-quota was taken. The restricted  
20 sub-fishery took its full sub-quota in less than 30 days  
21 this year. It took it in 15 days.

22 For the restricted fishery to last 30 days, you  
23 have to manage for it. You have to take management  
24 measures. The main one that is set forth in the plan is  
25 to reduce the daily vessel trip limits. 500 pounds per

1 vessel per day just won't work with a low TAC year. The  
2 tribes can, they did, and they predictably will take 11-  
3 to 12,000 pounds per day in the restricted fishery in good  
4 weather.

5 The Makah and others pointed out in intertribal  
6 meetings, both before and during the fishery, if the  
7 restricted sub-fishery would be maintained within its  
8 quota, there would have to be management measures, and  
9 there would have to be reductions to the trip limits in  
10 this fishery. The S'Klallams rejected any reductions  
11 whatsoever, until the restricted sub-quota was overtaken.  
12 The high end of the restricted sub-quota range was 48,000,  
13 and they rejected any reduction in the daily vessel trip  
14 limit until the catch was at least 61,000, and probably  
15 more, because fish came in, and were reported several days  
16 later.

17 In the Makah's view, the S'Klallams violated the  
18 plan. They violated the plan by continuing to fish after  
19 the restricted sub-quota was taken, and they violated the  
20 plan by refusing to agree to vessel trip limits as  
21 required by the plan to protect the 30-day sub-fishery.  
22 They failed to cooperate, in other words. Cooperation is  
23 necessary -- is a necessary element to this plan.

24 The S'Klallams argument that the 30-day term  
25 trumps everything else in the plan, including that

1 fishery's own sub-quota, has no basis in the plan itself.  
2 It has no basis in how the fishery was managed between  
3 2000 and 2003, when the 2000 plan was in effect, or in any  
4 court order interpreting the plan. Their position was  
5 rejected.

Once the Court's minute order came out on March 5th, it was clear that the only adjustments to the 2000 plan were in the international opening date and in the total quota for the entire fishery. The 2000 plan's sub-quota formulas were maintained and the 2000 plan's requirement of continued cooperation so the restricted sub-fishery could be open for 30 days was also maintained.

13 Now, this tyranny of the majority, that is an  
14 interesting way to put it. Unlike the S'Klallams, the  
15 Makahs actually tried to work with other tribes. Unlike  
16 the S'Klallams, the Makahs did not work alone. They  
17 worked diligently with other tribes. It tried to forge a  
18 consensus. It tried to make something work. It proposed  
19 management reductions to protect the 30 days. The  
20 S'Klallams would not move an inch. They wouldn't close  
21 their restricted fishery when it was taken, they just kept  
22 fishing, even after the sub-quota was taken. They  
23 wouldn't even stop fishing so the tribes could come to  
24 court.

25 The Makah didn't act unilaterally. The other

1 tribes can speak for themselves, but they viewed the  
2 S'Klallam position at the time as outrageous as well.  
3 Seven tribes viewed it that way and decided to open a  
4 12-hour unrestricted opening as part of the third fishery.

5 In hindsight, the Makah was most successful, so  
6 now the S'Klallam are trying as a tactic to isolate the  
7 late Makah. But the Makahs actually worked with other  
8 tribes, and the S'Klallams did not. It is mandatory under  
9 the plan to work with the other tribes.

10 The S'Klallams characterize themselves as having  
11 a small fishery. They had an all-time success this year  
12 by any measure. They have never pointed it out. It was  
13 the coastal tribes that were hurt this year. The Makah  
14 was hurt. The Quinault were hurt. The Quileute were  
15 hurt.

16 In our view, the S'Klallams have had some success  
17 distorting the fishery. They succeeded in getting out of  
18 their 2004 and 2006 agreements. They persuaded the Court  
19 that the 2000 plan was the status quo. But the 2000 plan,  
20 when it was in effect, between 2000 and 2003, wasn't  
21 particularly good for the S'Klallams. They didn't do well  
22 under it. So immediately after getting the 2000 plan  
23 adopted as the status quo, they tried to change it. They  
24 tried to change the sub-quotas under the plan. The Court  
25 rejected this, this bootstrapping, in its March 5th minute

1 order, but the S'Klallam continue to reject those  
2 sub-quotas, and they reject them today. They continue to  
3 ignore or reject every feature of the plan that isn't  
4 convenient for them.

5 We think that the S'Klallam have misinterpreted  
6 and violated the plan. At a minimum, it is obvious from  
7 the lengthy declarations that there was a serious  
8 disagreement about interpreting the 2000 plan, even after  
9 the Court's minute order.

10 At most, giving the S'Klallams' argument more  
11 credit than we think they deserve, it can be argued that  
12 the plan doesn't explicitly address what happens if the  
13 full restricted sub-quota is taken in less than 30 days.

14 This ambiguity in the plan, if that's what it is,  
15 was not resolved by the Court's minute order. And the  
16 S'Klallam explicitly acknowledge this in their briefing in  
17 footnote 3 of their reply. And this fact alone is enough  
18 to defeat their motion.

19 The legal standard for contempt is very high. We  
20 haven't really heard that standard from the S'Klallam. It  
21 is a drastic remedy. It has never been imposed in this  
22 case in any intertribal disputes. And we have been having  
23 intertribal disputes for almost the 40-year history of  
24 this case. The S'Klallam barely articulate that standard.  
25 They must show by clear and convincing evidence that the

1 Makah clearly, specifically, unequivocally violated a  
2 court order. There is nothing remotely like that here.

3 Unfortunately, we don't have a particularly  
4 specific decree here. Specificity is required if the  
5 punishment of contempt is going to be imposed. A  
6 disagreement about the meaning of a decree is not  
7 contempt. There can't be contempt if there is a good  
8 faith effort to comply with the Court's decree, which the  
9 Makah tried to do in this case.

10 There were some other incorrect statements made  
11 by the S'Klallams. First, there was no way this fishery  
12 was going to last another 15 days if the people did what  
13 the S'Klallams wanted to do. The numbers they put out are  
14 based on them fishing by themselves.

15 If they went out to fish, and if -- No one else  
16 was going to remain in port. Everyone was going to come  
17 out. And if the reduction from 500 pounds to 350, after  
18 the full sub-quota of the restricted fishery was already  
19 taken, it would have done nothing to protect the TAC. The  
20 average take per vessel per day in the landings in the  
21 restricted fishery -- in the landing zone restricted  
22 fishery were approximately 250 to 300 pounds a day. So it  
23 was meaningless. Other tribes would have gone out and  
24 fished out the rest of the quota in a few days anyway.

25 The majority of the tribes, after consultation,

1 including consultation with the S'Klallam, after the  
2 S'Klallam refused to close their fishery, scheduled a  
3 12-hour unrestricted opening, because the continuation of  
4 the restricted fishery after their sub-quota was taken  
5 threatened to preempt the rest of the fishery. The tribes  
6 were concerned that continuing to allow fishing along that  
7 line would preempt the third sub-fishery completely.

8 The 2010 TAC was slow. That made for a rough  
9 year, a difficult year for the halibut tribes to manage.  
10 But difficulty managing a fishery isn't contempt.

11 We have a minute order here that obviously  
12 doesn't answer all the questions about how to interpret  
13 the 2000 plan. The tribes may need additional guidance.  
14 The tribes may have to try to renegotiate a management  
15 plan that is easier to manage with the help of a  
16 settlement judge, as your Honor suggested in your last  
17 order. But these issues should be addressed in a  
18 proceeding where all the tribes can participate fully and  
19 not in a contempt proceeding like this.

20 We respectfully ask that the motion be denied.

21 THE COURT: Thank you. Ms. Rasmussen, anything  
22 further?

23 MS. RASMUSSEN: There is always wiggle room.  
24 There is always going to be the opportunity to come to  
25 this Court and say, well, gee whiz, your Honor, I couldn't

1 figure out how to comply, we were stuck, we did what we  
2 thought was reasonable. March 20th is not April 5th, 15  
3 days is not 30. The good faith interpretation of the plan  
4 required the parties to sit down before the start of the  
5 fishery, as the S'Klallam urged in their letter and their  
6 e-mail, and try to figure out how to make it work. Coming  
7 in 14 days into the fishery and saying, oh, too bad, so  
8 sad, you can't get your 30 days, is not compliance with  
9 the plan.

10 If you look at all the years that the plan was in  
11 place, you will see that never was the plan ever this  
12 short. Never did it close prior to the 30 days. Never  
13 was it interpreted the expected catch range for the  
14 restricted fishery as a hard cap could be used to  
15 frustrate the purposes of the plan.

16 And all the other things that the Makah argues  
17 have to do with that difference of opinion: Are you  
18 allowed to do that? Are you allowed to say that the  
19 unrestricted fishery can fully and freely use the  
20 management buffer, but the restricted fishery is not  
21 allowed to do so, even though it is the unrestricted  
22 fishery that has the language that says it shall be  
23 managed to not exceed this amount? Again, interpretation  
24 with the goal -- the common purpose of the plan would  
25 require no more attempts to game the system.

1           It is really hard to sit here and hear about how  
2 the Makah tried to achieve consensus, when on a repeated  
3 basis -- in 2009, you see it in black and white, seven out  
4 of 13 tribes is good enough, has been the permeating  
5 attitude in this fishery based on the entitlement.

6           Normally I would say a good faith proposal to  
7 enter into settlement discussions would be a wonderful  
8 thing. But often what has been happening is it is the  
9 party that wants to continue to do what it is doing, that  
10 wants to propose further settlement discussion as a way to  
11 avoiding the repercussions of their actions. And any  
12 wiggle room or equivocation on enforcing the terms of the  
13 plan, even if you were to choose to enforce it against us,  
14 your Honor, would be unacceptable. The parties need to  
15 get the clear message that just because a bunch of people  
16 agree with you does not relieve you of your obligations.

17           We ask this Court to hold the Makah in contempt  
18 and to enforce the provisions of the plan.

19           THE COURT: Thank you, counsel. The motion  
20 before the Court is a request the Court hold the Makah in  
21 contempt, order them to pay reasonable attorney fees  
22 necessary to bring this action and any other just and  
23 equitable relief.

24           After reading through all of this, there is no  
25 doubt in my mind there is a serious disagreement with the

1 interpretation and implementation of this plan. Whether  
2 it does have built-in ambiguity or not, it is obvious that  
3 nobody agrees exactly what it means.

4 There are only so many fish out there, there are  
5 so many fishermen. There are different parts to the  
6 agreement, the restricted fishery, the unrestricted  
7 fishery, the mop up, the 30-day plan. All of those parts  
8 are important, in my opinion. But I do agree that the  
9 only way to manage this is through the cooperation of all  
10 the tribes. That is why the Court has set up a process  
11 for everyone to get together and, if necessary, with the  
12 help of a judge, and iron out all of these issues.

13 In terms of the actual motion before the Court  
14 today, the legal standard for contempt has not been met  
15 here. Procedurally there are severe hurdles in the way,  
16 as pointed out by Mr. Raas's brief. On the merits, there  
17 are issues that prohibit the Court from reaching that  
18 conclusion as well.

19 It is obvious that everyone is frustrated, and I  
20 urge all of you to think about how we handle this before  
21 the next season comes up.

22 For now, the motion holding the Makah in contempt  
23 will be denied. All parties will bear their own costs.  
24 Thank you. We will be at recess.

25 (Adjourned.)

## **CERTIFICATE**

I, Barry L. Fanning, Official Court Reporter, do hereby certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

**Barry L. Fanning**